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# A Critical Comment on the Constitutionality of Executive Privilege

Saikrishna Bangalore Prakash<sup>†</sup>

From the earliest days of the Republic, American Presidents have asserted a right to conceal executive communications. That is to say, various chief executives have precluded Congress and/or the courts from probing particular executive branch conversations and documents on the grounds that the Constitution grants the President an “executive privilege”<sup>1</sup> to suppress at least some communications. Sometimes, Presidents have invoked national security concerns to justify the secrecy.<sup>2</sup> Other times, chief executives merely doubted Congress’s authority to demand certain communications.<sup>3</sup> Still others asserted that their ability to benefit from candid advice would be compromised should they expose private conversations and documents.<sup>4</sup> In addition to these plausible

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1. In truth, the phrase “executive privilege” originated during the Eisenhower administration. See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974); see also MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* 44 (1994) (confirming same). However, the arguments underlying executive privilege have existed for more than 200 years and perhaps even before the Constitution’s founding.

2. See ROZELL, *supra* note 1, at 40-41 (describing President James K. Polk’s refusal to turn over some documents to the House of Representatives relating to the return of the Mexican president on grounds that diplomatic embarrassment would ensue).

3. See 4 ANNALS OF CONGRESS 760-62 (1796) (letter of George Washington) (explaining that because the House was not involved in ratifying treaties, it had no right to inspect treaty negotiation instructions given to John Jay).

4. See President’s Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government

arguments, some advocates of executive privilege occasionally rely on what seems like a healthy dash of common sense: executive privilege must exist because the President simply cannot function without it.<sup>5</sup>

As might be expected with any controversial claim, objections to executive privilege arose. Members of Congress often were at the forefront of repudiating the President's pretensions to a privilege power and were swift to affirm the legislature's investigative prerogatives.<sup>6</sup> They denied that the President enjoyed a unilateral constitutional right to shield executive branch communications. In the wake of Watergate, academics joined the fray. Relying upon structural arguments stemming from a particular reading of the Necessary and Proper Clause, one highly-respected scholar cast doubt on the propriety of executive privilege.<sup>7</sup> Another scholar, drawing upon his rendition of history, even went so far as to declare that the notion that the Constitution sanctions executive privilege was a "myth."<sup>8</sup>

Does the Constitution clothe the President with a constitutional privilege to conceal executive conversations or documents from Congress and the courts?<sup>9</sup> In many, if not all,

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Operations, in *PUBLIC PAPERS OF THE PRESIDENTS: DWIGHT D. EISENHOWER 483-84* (1954) (instructing the Secretary of Defense not to testify or produce documents for the Army-McCarthy hearings on the grounds that such disclosures would chill "candid" advice in the future).

5. See Gary J. Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 154, 176 (Joseph M. Bessette & Jeffrey Tulis eds., 1981) (insisting that President could not "responsibly conduct his office" and fulfill constitutional duties without a privilege).

6. See 4 *ANNALS OF CONGRESS* 444 (1796) (John Nicholas asserting that by virtue of the House's "superintendence over the officers of Government," it enjoyed a "right to demand a sight of those papers that should throw light upon their conduct"); see also *id.* at 601 (comments of William Lyman affirming same); *id.* at 629 (comments of Edward Livingston affirming same).

7. See William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, *LAW & CONTEMP. PROBS.*, Spring 1976, at 102, 107.

8. See BERGER, *supra* note 1, at 1.

9. Some might not accept the sweeping definition of executive privilege discussed in the text. Various thoughtful individuals believe in a privilege that applies in only limited circumstances, e.g., where national security interests are at stake. Others might be willing to recognize a privilege in many more circumstances, but provide limited exceptions such as when the information is necessary for the defense in a federal criminal trial. Though it would be appropriate to discuss the various strains of executive privilege, I

circumstances such a prerogative probably would be necessary and proper to carry into execution the President's constitutional authorities.<sup>10</sup> As suggested above, national security considerations strongly bolster the case for an executive privilege. Moreover, such a privilege surely would generate frank advice for Presidents and would enable chief executives to make decisions and take numerous actions with an element of stealth. Properly wielded, an executive privilege could lead to superior enforcement of federal laws, enhanced supervision of foreign affairs, and a robust President capable of more fully utilizing his other presidential powers. Secrecy has its obvious advantages.

Nevertheless, there are reasons to doubt that the Constitution itself conveys a unilateral right to conceal executive communications. Familiar originalist tools such as text, structure, and history furnish only dubious support for an executive privilege, of whatever scope. In fact, the use of such tools arguably leads to the opposite conclusion, i.e., that the chief executive lacks a constitutionalized executive privilege. As we shall discover, so far as text is concerned, there are reasons to doubt that the Constitution grants the President an explicit or implicit executive privilege. Moreover, the negative implications stemming from congressional control of funds and of officers strongly suggest that Congress may control the availability of other means of carrying presidential power into execution, including executive privilege. Finally, much of the English and American history thought to firmly ground executive privilege in our Constitution has been woefully oversold; practices and episodes in England and during the early post-ratification era in America simply do not provide the unambiguous support claimed by proponents of a privilege.

Although startling to some, the claim that the President lacks an executive privilege hardly should be deemed extraordinary. Indeed, everyone recognizes that the President does not have the right to *any* means of executing his constitutional functions and duties. Rather, the chief magistrate is almost wholly dependent upon the legislative branch. Through the Necessary and Proper Clause, the

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will not spend much time differentiating amongst versions. The arguments laid out in Parts II and III are meant to respond to such claims generally, without regard to the subtle variations amongst all the accounts.

10. See Schmitt, *supra* note 5, at 176.

appropriations power, and its other constitutional authorities, Congress enjoys tremendous latitude in structuring how the executive branch functions. Congress grants the funds and creates the officers and departments and thus Congress controls the most important means of fulfilling the promise of executive power. Given the executive's absolute dependence on Congress for these far more central means of execution, perhaps Congress must furnish the unquestionably more peripheral means as well, such as executive privilege. In other words, the superior reading of our Constitution recognizes that for the most part, the President relies upon Congress for the indispensable, necessary, and merely useful means of executing his constitutional powers.<sup>11</sup>

All this does not deny the propriety of executive privilege; it merely casts doubt on the claim that an executive privilege necessarily emanates from the Constitution itself. In my view, Congress may cede an executive privilege via statute on the grounds that such a Necessary and Proper privilege statute carries into execution the President's constitutional powers.<sup>12</sup> As noted, a privilege arguably would enable the President to better take care that the laws were being faithfully executed, conduct foreign affairs, and command the military. Accordingly, though the Constitution does not cede a privilege itself, it erects no bar to a statutory executive privilege.<sup>13</sup>

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11. As we shall see, one must admit that a narrow range of incidental powers and privileges flow from those explicitly listed in Article II. Otherwise, many of the Article II powers become nothing but mirages. Notwithstanding such incidental powers, however, the President is largely dependent upon Congress for most indispensable and useful means of executing his constitutional authority. If we are to treat executive privilege as fitting into the category of incidental powers that automatically flow from Article II, surely there must be rather compelling historical or structural reasons for such extraordinary treatment. For a general discussion of this point see Van Alstyne, *supra* note 7, at 128.

12. Unlike Professor Berger, I do not believe that executive privilege is utterly incompatible with our Constitution. Professor Berger believes the doctrine is fundamentally at odds with his view of the Congress as the "Grand Inquest." See BERGER, *supra* note 1, at 12-13. Although Berger does not address the question of a statutory privilege, his approach, which seems to treat congressional investigations of the executive as the central feature of our government, probably would lead him to conclude that Congress cannot statutorily cede any executive privilege, for to do so would be to assign away the inalienable congressional powers of oversight and control.

13. There appear to be at least four possible views on privilege. Defenders of a constitutionalized executive privilege occupy one end of the spectrum. Though they differ quite sharply as to the scope of a privilege,

Without a doubt, one might be unmoved by originalist/structural arguments of the type to be made in detail later.<sup>14</sup> Indeed, many question the efficacy or relevance of originalist inquiries generally. Nevertheless, many arguments in favor of an executive privilege rest, at least in part, on claims about the Constitution's original meaning.<sup>15</sup> To the extent the arguments contained herein undermine this originalist case, the comment serves a useful purpose. At the very least, we shall see that much more work must be done by those who insist that, as an original matter, the executive enjoys a privilege to keep his, and his branch's, communications secret. Proponents of privilege have a tough row to hoe if they are to cling to the notion that the Constitution codifies an executive privilege.<sup>16</sup>

As a proponent of the view that the Constitution enshrines a unitary executive capable of superintending federal law execution, I reach these tentative conclusions with a great deal of reluctance. As noted earlier, a chief executive armed with a constitutional right to conceal communications surely would be a more effective enforcer of federal law and superintendent of foreign affairs. But we ought not to confuse the undoubted utility of an inherent executive privilege with its constitutionality.<sup>17</sup> As we shall see, under our Constitution, something can

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Professors Rozell and Johnsen both fit here because they agree that the Constitution grants an executive privilege of at least some scope. Given his apparent hostility to any form of executive privilege (whether part of the Constitution or granted by statute), Raoul Berger might be on the other end. In between these extremes lie two more nuanced positions. One might believe that the President is entitled to an executive privilege by virtue of the Constitution until Congress retracts that privilege via statute. To my knowledge, no one advocates such a view. Finally, there is the view that the Constitution neither grants nor forbids a privilege; instead Congress may provide a privilege via statute. As should be obvious, I subscribe to this final view.

14. As noted, I primarily make an originalist/structuralist argument regarding the original meaning of the Constitution. Nevertheless, the arguments discussed herein may be somewhat convincing to those who construe the Constitution using current meanings and current doctrine.

15. See ROZELL, *supra* note 1, at 23-32; Schmitt, *supra* note 5, at 162-76.

16. Of course, I face a difficult task as well. The tentative conclusions discussed above run counter to the largely-accepted orthodoxy that the Constitution protects at least some executive communications. In the Clinton scandals, as in the Nixon scandals, most are inclined to accept the legitimacy of at least some executive privilege. Disputes arise only over the extent of that privilege. Given such beliefs, widespread skepticism will greet any one who wholly denies the legitimacy of executive privilege.

17. Were I searching for the best answer given current realities, I would support an interpretation constitutionalizing some kind of executive privilege.

be absolutely indispensable and yet be unavailable to the President as of right. Thus, while favoring a narrow executive privilege, I believe that Congress must confer such a privilege.

Part I summarizes some of the arguments in favor of recognizing a constitutionalized executive privilege. Part II analyzes text and structure, informed by snippets of history to cast doubt on the constitutionality of an executive privilege. Part III examines historical practices during the Washington administration relevant to the issue at hand. Given the nature of the comment, the conclusions are necessarily tentative. While I have searched for pre-ratification discussions of something resembling our notion of executive privilege, I have not done as thorough a search as possible. Nor have I examined at great length all the primary documents. Accordingly, I largely rely upon the excellent work of Professors Mark Rozell, William Van Alstyne, Abraham Sofaer,<sup>18</sup> and others in reaching my historical conclusions.

## I. THE CASE FOR EXECUTIVE PRIVILEGE

Before turning to the task of considering the validity of executive privilege, we consider the weighty arguments favoring the privilege. As noted earlier, those who endorse the propriety of executive privilege do so for a variety of reasons: textual, structural, historical, common sense, etc. Found below are summaries of four of the most significant arguments for executive privilege. Proponents of executive privilege may believe that the right derives from any one or more of these grounds.

First, as an historical matter, perhaps the executive power vested in the President by Article II, Section 1 encompassed a right to conceal executive papers and communications.<sup>19</sup> In

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I find the arguments about utility and necessity convincing. Because I adopt an originalist approach, however, these arguments cannot automatically carry the day.

18. Professor Abraham Sofaer has written an excellent book on various separation of powers issues arising during the early years of the Republic. See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976).

19. Obviously, if one does not believe that the Article II Vesting Clause cedes any power, then one cannot make this particular argument for executive privilege. Indeed, many doubt that Article II's Vesting Clause vests any additional power above and beyond the authorities listed elsewhere in Article II. An inter-article comparison of sections one across the first three articles strongly suggests, however, that while Article I, Section 1 clearly does not add

other words, executive privilege might have been one commonly recognized attribute of the "executive power." In this way, the Executive's privilege power actually might be quite explicit, but because we are ignorant of the proper understanding of the phrase "executive power," we fail to appreciate the privilege's clear legitimacy.

Second, executive privilege might have been so essential, so inherent in a Chief Magistrate's functions that executive privilege was, and should be, considered inextricably bound up in office of the Chief Magistrate. When we fail to recognize the propriety of such inherent authorities, we adopt a much too cramped understanding of constitutional authority. For example, while the Constitution prohibits the Congress from varying the President's salary while the President is in office, the Constitution does not guarantee, explicitly, an oxygen-filled air supply. Faced with a particularly despised President, could Congress deny oxygen?<sup>20</sup> Surely not. Congress simply cannot pass a statute that would siphon off the oxygen from the President's air supply because oxygen-filled air is an inherent right of the Chief Executive. More generally, the Constitution contemplates that the President will be able to undertake his constitutional duties and assuredly implicitly guarantees some of the wherewithal necessary to fulfill those duties. On one view, executive privilege fits quite comfortably (and obviously) into this category. It may not be safeguarded explicitly, but it surely must exist because like oxygen, it is essential and inherent in the office of the Chief Executive. In a former capacity, Chief Justice Rehnquist put the argument well when he insisted that the "doctrine itself is an absolutely essential condition for the faithful discharge by the executive of

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to congressional authority, Section 1 of Articles II and III does seem to grant substantive authority beyond the powers listed in the remainder of those Articles. Thus, the vesting of executive power appears to vest authority beyond those powers specifically listed elsewhere in Article II. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175-85 (1992). Based on such arguments, Professor Calabresi and I have defended a minimalist approach to the Article II Vesting Clause, arguing that the federal executive's "executive power" includes the power to execute all federal law. *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

20. For a moment, put aside questions about congressional authority for such a bizarre statute and the constitutional prohibitions against bills of attainder and the like.



his constitutional duties."<sup>21</sup> Although related to the first argument, this claim is not grounded on a shared understanding of "executive power," but instead on the assertion that executive privilege is one of the inherent attributes of a chief executive.

A third claim for executive privilege rests on its mere utility and abandons any pretensions that executive privilege is strictly indispensable or inherent in a chief executive. Without an executive privilege, the President will lack the forthright advice he requires to carry out his constitutional powers because the quality of executive deliberations and counsel will suffer appreciably if participants understand that their conversations and documents can be uncovered by a zealous litigant or by a prying Congress.<sup>22</sup> With respect to delicate negotiations, private positions may harden when forced into the sunshine.<sup>23</sup> Alternatively, skittish participants may abandon bold, but risky proposals when the proposals are made public.<sup>24</sup> And, of course, certain aspects of military and foreign policy demand concealment of plans or sources.<sup>25</sup> Most understand the undoubted utility of executive privilege and the role it could play in fostering a strong and independent executive branch capable of exercising and defending its constitutional prerogatives.

Finally, perhaps the sum of all Article II powers is more than the parts. Considering each Article II authority in isolation may not advance the claim of executive privilege very much. Put together, however, perhaps the executive power, the authority as Commander-in-Chief, the Take Care Clause, the ability to receive ambassadors, etc., generate a "shadow" granting some executive privacy rights, so to speak. In other words, no one textual authority confers a privilege. Rather, the interaction of all the Chief Executive's authorities arguably generates an executive privilege from Article II penumbras.<sup>26</sup>

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21. ROZELL, *supra* note 1, at 49.

22. See Ralph K. Winter, Jr., *Watergate and the Law: Political Campaigns and Presidential Power*, in PAMPHLETS ON ELECTIONS 55 (1974).

23. See *id.*

24. See *id.*

25. See ROZELL, *supra* note 1, at 49-53.

26. In addition to these arguments, one also might try to establish an executive privilege by reference to just one of the many textual grants of authority after the Article II Vesting Clause. Such a foundation might be possible as an historical matter. However, the resulting privilege would be limited to those communications that were in furtherance of the relevant authority. For example, if the authority to receive ambassadors includes a

Historical understandings and practices may substantiate or refute some of these arguments.<sup>27</sup> George Washington and numerous other Presidents are said to have invoked an executive privilege in their dealings with Congress and the courts. While there may not have been a shared understanding of the foundations of such claims, surely some of the arguments above were part of the executive branch's rationales for decisions to withhold executive documents or testimony.<sup>28</sup>

The next part begins to address some of the claims discussed above and considers textual and structural reasons for doubting the propriety of executive privilege. Part III continues the analysis by considering some of the relevant historical evidence in favor of an executive privilege and finding such evidence unconvincing.

## II. TEXTUAL AND STRUCTURAL REASONS TO DOUBT THE PROPRIETY OF AN EXECUTIVE PRIVILEGE

Starting with first principles, the Constitution confirms that the federal government only enjoys the authorities that the Constitution itself confers.<sup>29</sup> While we typically consider the Tenth Amendment in the context of assessing Congress's legislative powers, the Amendment also constrains the other two branches. All federal institutions operate against the

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privilege, one would assume that the privilege would exist only when the communication is incident to the reception of ambassadors and would not extend to a decision relating to execution of domestic laws. I do not examine whether provisions other than the Article II Vesting Clause may provide support for narrow versions of executive privilege. By the same token, I am unaware of any scholar claiming that the historical understanding of a provision outside the Article II Vesting Clause includes an executive privilege.

27. I do not treat the post-ratification practices as an independent argument for or against executive privilege because I do not believe that many would cite such practices independently of any textual or structural arguments. These practices only may help confirm the other constitutional arguments made by the defenders of executive privilege. In any event, there are reasons to doubt the relevance, the clarity, or the consensus surrounding such practices.

28. Some defenders of executive privilege also might insist on the propriety of a similar judicial privilege. Because some of these arguments are based on the wording of Article II, however, these reasons may not help illuminate the basis for any judicial privilege that might exist. Thus, those who believe in a judicial privilege may favor those arguments that might also bolster the case for a judicial privilege.

29. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

backdrop of the redoubtable doctrine of enumerated powers. Accordingly, if the Constitution confers an executive privilege, there must be some textual or structural<sup>30</sup> basis for it; otherwise the power to confer such a privilege remains with the States or with the people.

Perhaps in recognition of the doctrine of enumerated powers, the Constitution carefully enumerates certain legislative "privileges." Save for a limited category of offenses, no one can detain members of Congress during their attendance of a session of Congress, and no one can "question" them for their congressional speeches and debates.<sup>31</sup> Congress also may keep its legislative proceedings concealed.<sup>32</sup>

In contrast, the Constitution seems to lack an explicit reference to anything resembling an executive privilege. As everyone recognizes, the phrase "executive privilege" is nowhere to be found. More importantly, the Constitution is bereft of any obvious references to a power to keep executive proceedings "secret" or to a right "not to be questioned" regarding executive communications. Conceivably, the apparent absence of such authority may indicate a deliberate decision not to cede such power. After all, the presence of certain significant congressional privileges and their notable absence with respect to the President and the judiciary may tempt us to conclude that the Framers and Ratifiers chose to deny these privileges to the magisterial branches.<sup>33</sup>

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30. *McCulloch v. Maryland* established that, unlike the Articles of Confederation, federal powers under the Constitution need not be express, and that the Constitution does not exclude "incidental or implied powers." 17 U.S. (4 Wheat.) 316, 406 (1819).

31. See U.S. CONST. art. I, § 6, cl. 1 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

32. See *id.* art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . .").

33. Admittedly, this is a somewhat unreliable *expressio unius est exclusio alterius* argument. Indeed, one might argue that Congress's privileges are limited and enumerated because in the absence of such specification, people would doubt the propriety of such privileges. On the other hand, the enumeration of such privileges for the President and Judiciary might not have been necessary precisely because almost everyone recognized the propriety of such privileges for the executive and judicial magistracy.

Such casual observations, however, hardly resolve the matter. As noted earlier, if executive privilege exists in the Constitution under another name or as a necessary implication of other constitutional prerogatives, such foundations doubtlessly would validate executive privilege. In this part we consider the three arguments for privilege grounded on supposed implications from the text, deferring for later the first claim about the meaning of executive power. To be sure, none of these assertions are rooted in an extreme view of executive power. Nor does any transform our republican President into a monarch.

Notwithstanding their reasonableness, however, each argument suffers from flaws. Historically speaking, the Framers and Ratifiers appreciated (and sometimes celebrated) that the President would depend upon congressional legislation to help carry into execution his Article II powers. That is to say, the President lacked a constitutional right to any and all necessary or even helpful means of executing his powers. Congress would supply the funds, raise the armies and navies, and create the officers and departments, notwithstanding the absolute centrality of these means to the executive branch's operations. Today, we continue to acknowledge congressional control of these indispensable incidental powers and the accompanying implied restraints on executive authority over the choice of ancillary powers. Quite understandably, this rendition of presidential power has negative implications for assertions that the President enjoys an inherent executive privilege, a useful executive privilege, or an executive privilege arising from constitutional synergies. If Congress provides the far more crucial funds, men and executive institutions, perhaps Congress must authorize plainly less consequential means, including whether the President will enjoy an executive privilege.

#### A. THE CONSTITUTION OF EXECUTIVE MEANS

Article II vests numerous powers in the hands of the President, including the Executive Power, the authority as Commander-in-Chief, the power to receive ambassadors, the capability to prorogue Congress, the ability to nominate individuals for federal offices and the right to negotiate

treaties.<sup>34</sup> Outside of Article II, Article I cedes the power to veto legislation.<sup>35</sup> As we shall see, notwithstanding these robust powers, the President does not possess the constitutional authority to command the means of ensuring the complete utilization of them. That is to say, the President does not command the inherent right to employ any means of implementing his powers.

### 1. Expending Funds on Executive Tasks

Without a steady and sufficient supply of funds, the President cannot possibly satisfy his constitutional duties or fulfill the promise of his executive powers. No one doubts that to execute the laws, to negotiate treaties, to receive ambassadors, etc., one needs money. Nonetheless, constitutionally speaking, the President is only entitled to his salary,<sup>36</sup> not a particular executive budget. Congress controls the purse strings and determines the executive budget. Every year, Congress, pursuant to Article I, Section 8, Clause 1,<sup>37</sup> decides what programs and functions to fund and determines the amount and conditions of funding.<sup>38</sup> In making these decisions, Congress does not act unconstitutionally should it fail to fund assistants to help the President execute the laws.<sup>39</sup> Nor would

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34. See generally U.S. CONST. art. II.

35. See *id.* art. I, § 7, cl. 2.

36. See *id.* art. II, § 1, cl. 7. The only other required expenditure is the provision that requires Congress to compensate federal judges while at the same time forbidding it from decreasing the compensation of federal judges. See *id.* art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receives for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

37. See *id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

38. Sometimes Congress passes multi-year appropriations or uses entitlement spending that avoids the need for yearly appropriations. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 605-09 (1988).

39. Congress traditionally does not appropriate funds to ensure complete enforcement of federal law. The power to partially fund federal law enforcement must stem from a general authority to decide funding levels. Put another way, underlying the undoubted ability to partially fund law enforcement is the more general ability to decide not to fund law enforcement at all. Of course, one might argue that Congress is constitutionally required to fund at least some enforcement of each federal law. Cf. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1351 (1988) (maintaining

Congress fail in its constitutional duties should it decline to appropriate money to help the President negotiate treaties. Finally, although the President may veto legislation, the Congress need not fund legal assistants necessary to insure that the President actually comprehends such legislation.

Certainly, any sensible Congress will appropriate funds to ensure that the President may enforce at least some of its laws.<sup>40</sup> After all, almost all of a law's utility comes from its enforcement. Moreover, any responsible Congress will choose to insure that the President may meaningfully exercise his other constitutional authorities. For instance, the nation surely benefits from the President's stewardship over foreign affairs. Accordingly, most of us would be swift to condemn Congress if it chose systematically to withhold executive branch funding. Nonetheless, Congress does not disobey the Constitution by refusing to appropriate funds for these indubitably important and worthwhile activities.

Of most interest to us, however, is the powerful inference to be drawn from the principle of near-absolute congressional control of the fisc: the President cannot raid the Treasury unilaterally in order to secure funds to execute his constitutional functions. Rather, every cent taken out of the Treasury must be by virtue of a legislative appropriation. Indeed, there is a specific prohibition to prove it: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."<sup>41</sup> An implicit corollary also ties the Executive's hands in another significant way: absent

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that Congress must provide funds for the reception of ambassadors and the negotiation of treaties).

40. At the same time, we should not be surprised that Congress would not want some laws enforced. For instance, we might expect Congress to deny funding for the execution of a law that is unpopular with Congress but favored by the President. Indeed, Congress might specifically forbid the use of funds to enforce a particular law. *Cf.* Stith, *supra* note 39, at 1353 (discussing Congress's ability to place conditions or "strings" on appropriations). A law passed by a previous Congress controlled by a different party might be very difficult to repeal, but easily could be thwarted by a lack of funds.

41. U.S. CONST. art. I, § 9, cl. 7. Although the prohibition is listed among the limitations following the enumeration of Congress's powers in Article I, Section 8, and thus might be construed as only applying to Congress, the prohibition effectively limits the government generally. Because only Congress has affirmative authority over the fisc, the restriction ensures that no branch of the federal government may dip into the treasury absent an appropriation. Professor Stith has given a name to the prohibition established by Article I, Section 9, Clause 7: the "Principle of Appropriations Control." Stith, *supra* 39, at 1356-57.

legislation to the contrary, funds derived from taxes and other sources of revenue cannot be expended but must be deposited in the Treasury.<sup>42</sup> For instance, the President cannot secure his own source of funds and expend it without legislative authorization. Accordingly, although money is undoubtedly the mother's milk for the executive branch,<sup>43</sup> the Chief Executive has no constitutional right to expend funds in the absence of a legislative appropriation.

Many members of the founding era recognized the bedrock constitutional principle that Congress would control the all-important purse.<sup>44</sup> Others emphasized the necessary implications for the President and other branches attempting to bypass the appropriation process. James Wilson insisted that the Senate and President could not conspire to corrupt the Judges they appointed by using the lure of money because the House was necessary to pass an appropriation.<sup>45</sup> Ridiculing the oft-heard complaint that the President would be America's King, *Americanus* (John Stevens, Jr.) wrote that while the English monarch controlled "the collection, management and expenditure of an immense revenue, deposited annually in the Royal Exchequer," the American President had "none" of these powers.<sup>46</sup> Given the textual constraints, it is not surprising

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42. Professor Stith labels the requirement that all the funds of the United States be deposited in the Treasury as the "Principle of the Public Fisc." Stith, *supra* note 39, at 1356.

43. Cf. THE FEDERALIST NO. 30, at 188 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966) (insisting that money is "the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions").

44. See, e.g., THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966) (discussing legislative control of the purse); THE FEDERALIST NO. 58, at 359 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966) (commenting on the House's central role over the purse); *Oliver Ellsworth Defends the Taxing Power and Comments on Dual Sovereignties and Judicial Review* (Jan. 7, 1788), in 1 DEBATE ON THE CONSTITUTION 877 (Bernard Bailyn ed., 1993) (remarks of Oliver Ellsworth) (observing that Congress has purse and sword, as must all governments); *Robert R. Livingston, Melancton Smith, and John Jay Debate Aristocracy, Representation, and Corruption* (June 23, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra*, at 776, 780-81 (Robert Livingston contending the same).

45. See *James Wilson's Summation and Final Rebuttal* (Dec. 11, 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 44, at 832, 852 (remarks of James Wilson) (debating at the Pennsylvania ratifying convention).

46. "*Americanus*" [John Stevens, Jr.] II (Nov. 23, 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 44, at 415, 417.

that legislative control of the purse strings was so well understood. The President would need to rely upon Congress for this indispensable means of execution.<sup>47</sup>

## 2. Raising Armies and Navies and Calling out the Militia

Congress's power of the purse also plays a crucial role in ensuring that the President's Power as Commander-in-Chief is not a nullity. Under our Constitution, the President is the Commander-in-Chief of the United States armed forces and of the militia.<sup>48</sup> Disputes about the extent of this power have persisted since the Nation's founding.<sup>49</sup> Nevertheless, whatever the true extent of the power, one thing is clear: the President's power as Commander-in-Chief is utterly dependent upon Congress because Congress need not fund the armed forces or the militia. In addition to its general defense spending authority,<sup>50</sup> Congress also has the specific power to "support Armies," to "maintain a Navy," and to "provide for . . . arming" the militia.<sup>51</sup>

Of course, the President not only needs Congress to appropriate funds to pay and equip the armed forces, Congress also must create the armed forces and call out the militia in the first instance. Congress enjoys the explicit authority to "raise" armies, to "provide" a navy, and to "call[ ] forth the Militia."<sup>52</sup> Thus Congress resolves whether to have an army or navy and judges when the militia will be called into federal service.<sup>53</sup>

Congressional control of the creation of the armed forces was quite purposeful. We often forget that many members of the founding generation were quite afraid of standing armies.

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47. Professor Sofaer observes that these principles were understood after the Constitution's ratification as well. See SOFAER, *supra* note 18, at 70 (observing that no one disputed that the Constitution requires that Congress appropriate funds to accomplish executive branch objectives).

48. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

49. See SOFAER, *supra* note 18, at 147-54 (discussing controversies relating to control of armed forces during John Adams' administration).

50. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence . . .").

51. *Id.* art. I, § 8, cls. 12, 13 & 16.

52. See *id.* art. I, § 8, cls. 12, 13 & 15.

53. See *id.* art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence . . .").



Many thought them fundamentally incompatible with, and a danger to, a republic.<sup>54</sup> According to Alexander Hamilton, this view finds ancient expression in the English Bill of Rights: "the raising or keeping of a standing army within the kingdom in time of peace, unless with the consent of Parliament, was against law."<sup>55</sup> Indeed, The Declaration of Independence indicted the English King for stationing "in times of peace, Standing Armies without the Consent of our legislatures."<sup>56</sup> The Constitution reflects that heritage when it cedes control over the creation and the funding of the armed forces to the Congress rather than the Executive.<sup>57</sup> The Constitution also embodies a fair amount of misgivings regarding the legislature itself when it prohibits army appropriations for more than two years.<sup>58</sup>

Assuredly, most of us no longer share such fears. Many do not view the modern standing armed forces as a mercenary force that threatens the Republic. In fact, we are for more likely to condemn Congress for not creating and funding an armed force. Indeed, in this era of submarines and ballistic missiles, it might be positively "criminal" for Congress to decline to establish a professional military. Likewise, we might decry a congressional unwillingness to call forth the

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54. Alexander Hamilton dedicated three of the *Federalist Papers* on the subject, pointing out that Congress may, but need not, create a standing army and that such power is necessary. See THE FEDERALIST NOS. 24-26 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966); see also James Wilson's *Summation and Final Rebuttal*, *supra* note 45, at 859 (remarking on the fears about a standing army).

55. THE FEDERALIST NO. 26, at 169 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966).

56. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

57. See THE FEDERALIST NO. 24, at 158 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966) (observing that the legislature, not the President, controls the funding and creation of armed forces). These fears also found expression in state constitutions during the ratification era. According to Hamilton, no state constitution adopted an outright ban against the use of standing armies in times of peace. See *id.* Pennsylvania and North Carolina had provisions that "[a]s standing armies in time of peace are dangerous to liberty, THEY OUGHT NOT to be kept up." See *id.* at 158. The constitutions of other states (New Hampshire, Massachusetts, Delaware and Maryland) were worded similarly, but explicitly provided for legislative creation of a standing army. See *id.*

58. See U.S. CONST. art. I, § 8, cl. 12; THE FEDERALIST NO. 24, at 158 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966); THE FEDERALIST NO. 26, at 171-72 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966).

militia in times of national crisis. Nevertheless, our modern approach to the professional military and our view of current national security realities hardly alters constitutional realities. The Congress simply would not violate the Constitution if it declined to create an army and navy. Nor would it breach the Constitution if it neglected to call forth the Militia or refused to adopt standards to be used by the President to call out the Militia.<sup>59</sup>

The necessary inference of all the above is that the President cannot create or fund his own armed forces. More importantly, his power as Commander-in-Chief amounts to nothing unless Congress first raises the armed forces and calls out the militia. As future Supreme Court Justice James Iredell observed, "[t]he President has not the power of declaring war by his own authority, nor that of raising fleets and armies: These powers are vested in other hands."<sup>60</sup> In this way, the Constitution contemplates a Commander-in-Chief who may be a Commander of absolutely no one from time to time.

### 3. Creating Officers and Departments

One could make parallel arguments about the President's non-military executive powers. Without the assistance of Cabinet Secretaries, attorneys, file clerks, and millions of others, the Chief Executive would not be able to fully realize most, if not all, of his executive powers. For instance, while Presidents may veto bills,<sup>61</sup> they generally need assistants to help them understand, and even read, the often immensely

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59. See *James Wilson's Summation and Final Rebuttal*, *supra* note 45, at 859 (asserting that the Constitution does not require an army); see also *Robert R. Livingston, Melancton Smith, and John Jay Debate Aristocracy, Representation, and Corruption*, *supra* note 44, at 780-81 (arguing that Congress controls the purse and sword).

60. *James Iredell on the Presidency, Spies, the Pardoning Power, and Impeachment* (July 28, 1788), in 2 *DEBATE ON THE CONSTITUTION*, *supra* note 44, at 870, 871 (comparing the English King to the American President and noting that the President cannot call out militia because only Congress may do that). Oliver Ellsworth agreed when he noted that unlike England, the American Executive would control neither purse nor sword because Congress controlled both. See *Oliver Ellsworth Defends the Taxing Power and Comments on Dual Sovereignties and Judicial Review*, *supra* note 44, at 882; see also *THE FEDERALIST* NO. 69, at 417-18 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966) (observing that unlike the English King, the President could not unilaterally create an army or a navy or call out the militia).

61. See U.S. CONST. art. I, § 7, cl. 2.

dense and complicated bills that Congress enacts.<sup>62</sup> Indeed, whether a nuclear engineer, actor, or graduate of the Yale Law School, the President needs some assistance. Likewise, the President may pardon individuals for offenses against the United States.<sup>63</sup> To make this power meaningful, however, the President needs subordinates to help him wade through the hundreds of pardon petitions so that he may separate the unworthy from the truly worthy.<sup>64</sup>

Most importantly, the President has the power to execute federal law.<sup>65</sup> At a minimum, that is what the executive power is all about.<sup>66</sup> As President George Washington recognized, however, this is not a task for one man alone.<sup>67</sup> The President needs assistants, his auxiliary eyes, ears and arms. Indeed, the existence of millions of civilian executive officials<sup>68</sup> proves the necessity of at least some executive subordinates. One could examine other powers and come to the same conclusion: the President needs executive officers to help him carry into execution his constitutional powers. Without such subordinates, the President is but a shadow of the one we recognize today.

Notwithstanding the absolute necessity of executive institutions and officers, the Necessary and Proper Clause suggests that Congress plays the crucial role in staffing the

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62. During the First Session of the 105th Congress, Congress enacted statutes totaling 2,691 pages of law. See 105 U.S.C.A.N. 1 (1998). No responsible Executive would dare face the task of reviewing this volume of legislation alone.

63. See U.S. CONST. art. II, § 2, cl. 1.

64. In fiscal year 1997, the President received over 685 clemency applications and had pending from previous fiscal years some 1,174 applications. See BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 449 (1998).

65. See U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. II, § 3, cl. 1 (providing that the President "shall take Care that the Laws be faithfully executed").

66. See generally Calabresi & Prakash, *supra* note 19.

67. Letter from George Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), in 30 WRITINGS OF GEORGE WASHINGTON, 1788-1790, at 343-44 (John C. Fitzpatrick ed., 1939) (observing that the President cannot perform all his tasks without executive assistants).

68. As of September 30, 1996, there were 1,714,352 civilian employees in the Executive Departments and 1,070,245 employees in the so-called independent agencies. See STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 348 (1997).

Executive Department.<sup>69</sup> Congress ensures that the President's powers are "carried into execution" by enacting laws that establish when and how to provide assistants.<sup>70</sup> To be sure, Congress must respect the Constitution's ground rules for Executive powers. The President decides whether to veto. No one else can make that decision for him. The President resolves whom to pardon and no one else can dispense such mercy. Yet within the boundaries of the Constitution's granting of certain powers to the President, Congress has tremendous latitude. Congress decides whether there will be an increase in the number of border patrol officers to help the President enforce our immigration laws. Congress resolves whether the EPA will be headed by one Cabinet official or by a multi-member body. Congress determines if it should create (or reauthorize) the State Department and its officers to help the President superintend the management of foreign affairs.<sup>71</sup>

Once again, we would denounce Congress for not creating such executive officials and institutions. Congress ought to pass laws that are designed to help the President execute the law. Congress certainly should afford the President assistance in the use of his other constitutional powers. But that does not mean that Congress violates the Constitution when it fails to reauthorize an Office of Management and Budget, an Energy Department, or the Office of the Pardon Attorney. Indeed, for over two centuries, Congress created the officers and departments, deciding whether, when, and how it would furnish the means of assisting the President in the use of his constitutional powers and in the fulfillment of his constitutional duties.

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69. See U.S. CONST. art. I, § 8, cl. 18 (providing that the Congress shall "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); see also Calabresi & Prakash, *supra* note 19, at 592-93.

70. See U.S. CONST. art I, § 8, cl. 18. One tell-tale sign of the crucial congressional role in creating the assistants of the Chief Executive is found in the Appointments Clause, which notes that the President nominates "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and *which shall be established by Law.*" *Id.* art. II, § 2, cl. 2 (emphasis added).

71. Some may blanch at the suggestion that Congress could refrain from creating a State Department. As noted in the text, I would join those who would condemn such a legislative refusal. However, such regrettable congressional contumacy does not establish a constitutional violation.

The necessary implication of the above arguments is that the President cannot create such offices, officers, and departments on his own whim. Unlike the English monarch of the founding age,<sup>72</sup> the President cannot create his own offices. As noted, that power and task is left to Congress pursuant to the Necessary and Proper Clause.<sup>73</sup> Even if he could create offices, however, he cannot make unilateral appointments absent legislative sanction. The default rule is that the Senate must confirm appointments.<sup>74</sup> Thus, the Constitution not only forbids the presidential creation of offices, it also bars him from filling legislatively-created offices without legislative authorization.

With respect to funding, the armed forces, and officers and departments, the President could make unassailable arguments that expending funds, creating an army and navy, and creating assistants are necessary and proper to carry into execution his constitutional authorities. He even could insist that they are absolutely "necessary" and that it would be utterly "improper" for him to be without such means. Indeed, these authorities are far more central to a properly functioning executive than a right of executive privilege. Regardless, our Constitution's President completely depends upon Congress for these means of execution.<sup>75</sup> The President simply cannot resort

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72. See THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Willmore Kendall & George W. Carey eds., 1966) (asserting that the English King is "the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure, and has the disposal of an immense number of church preferments."); see also "Americanus" [John Stevens Jr.] II, *supra* note 46, at 416 (discussing the English King's powers to create "Peers" and distribute "titles and dignities"). Of course, the Declaration of Independence remonstrated that the King "has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance." THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

73. See U.S. CONST. art I, § 8, cl. 18; *supra* note 69 and accompanying text.

74. See *id.* art II, § 2, cl. 2 (stating that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"). Acting together, however, both chambers may cede away the Senate's rights with respect to "inferior" officers. See *id.* ("But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

75. None of the above denies the President's unquestionable right to take personal steps to carry into execution his constitutional powers. The

to self-help to obtain such means because Congress must judge when, how, and in what circumstances the President will receive funding, armies and navies, and executive officers.<sup>76</sup>

Given these admittedly uncomfortable constitutional realities, how can we believe that the President has either an inherent or a penumbral right to secret communications? As noted, constitutional structure makes clear that the most important means are completely left to Congress to provide. Unless there are powerful textual, structural, or historical arguments to the contrary, it should be the case that Congress not only controls the more central means, but the peripheral means of execution as well.<sup>77</sup> Put another way, if Congress controls the most significant means, we might be surprised to learn that the President enjoys the power to draw upon a far less important means of executing his constitutional duties and powers.<sup>78</sup> Indeed, it seems somewhat incongruous to hold that the President cannot create or fund officers but that he has the right to confide his confidences in secret with those officers once they are created.<sup>79</sup> Just as in the case of the creation of

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President retains the right to veto laws even if Congress does not provide legal assistance. *See id.* art. I, § 7, cl. 2. The President may still pardon individuals. *See id.* art. II, § 2, cl. 1. He may even make assuredly feckless attempts to enforce federal law all by himself. The discussion above, however, relates to whether the President is entitled to legislation that helps carry into execution his constitutional powers and whether the President may resort to constitutional self-help in the absence of such legislation.

76. *See generally id.* art. I, § 8, cls. 1, 12, 13, and 18.

77. Strictly speaking, this is not a "greater power includes the lesser power" argument. In particular, I am not asserting that funding and creating officers, etc., is a greater power that includes the ability to grant or withhold an executive privilege. I am merely claiming that given Congress's admittedly almost complete control of the means of executing the President's Article II powers, we might be inclined to discount suggestions that the Constitution cedes a less important and more ancillary executive privilege.

78. Of course, one might conclude that the Constitution grants Congress control over only the most important means and that the Framers and Ratifiers purposely left the less important means in the hands of the President precisely because they were less consequential. Such an argument merely underscores the difficulty of a structural argument.

79. We must recognize one situation that may seem equally incongruous. Although the President cannot create or unilaterally appoint principal officers, the President has the constitutional right to demand written opinions from the principal officers of the executive departments. *See U.S. CONST.* art. II, § 2, cl. 1 ("[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."). Without a doubt, the Opinions Clause is a strange bird. If redundant, it suggests that demanding opinions was an acknowledged power of the Chief Executive and thus casts doubt on my

offices and departments, perhaps Congress must act pursuant to the Necessary and Proper Clause before the President may enjoy an executive privilege.

#### 4. The Necessary and Proper Clause and the Means of Executing Executive Powers

Of course, others have made this claim before. As Professor William Van Alstyne observed in the aftermath of the Nixon scandal, only Congress enjoys the authority to enact all laws necessary and proper to carry into execution all powers of the federal government.<sup>1</sup> Only Congress may cede to the other branches incidental authorities relating to carrying into

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argument. If not redundant, perhaps the Clause was necessary to establish a bare minimum of presidential "rights" with respect to principal officers. On the record, I have vacillated about whether the Clause was redundant. See Calabresi & Prakash, *supra* note 19, at 633-64 (clause may have been included out of an abundance of caution to ensure that President would have advice; alternatively, clause may actually limit the President's ability to seek generic advice about matters of state from principal officers).

Of course, the Clause may hint at a meaning quite lethal to executive privilege. James Iredell, in both writing and at the North Carolina ratifying convention, highlighted the "written" nature of the opinions: "[T]he necessity of their opinions being in writing, will render them more cautious in giving them, and make them responsible should they give advice manifestly improper. [The opinion method] is plain and open." 4 THE FOUNDERS' CONSTITUTION 12 (1987); see also *Observations on George Mason's Objections to the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 348 (Paul Leicester Ford ed., 1888) (noting that a written opinion "speaks for itself" both to the future and the present). The only way that a written opinion would be "open" and "speak for itself" in the present is if the opinion could not be kept secret. Indeed, if the President could keep it secret, no benefit would be secured by memorializing it. After all, oral opinions would seem to suffice for the President. Thus there is some reason to think that the Clause supports the notion that the President cannot demand that his interactions with Cabinet Secretaries be kept secret.

Even if we do not view the Clause as supportive of the claim that the President lacks an executive privilege, we must remember that there is a specific textual basis for this less important and peripheral means of executing his constitutional powers. My claim is that there is no similar basis for executive privilege. Except with respect to written opinions relating to their departments, the President cannot demand particular assistance from executive officers. For instance, the President cannot order the Secretary of Commerce to assist him with the enforcement of particular laws not related to the Secretary of Commerce's statutory duties. Subject to the Article II's vesting of particular powers, the President takes his officers as is. See Calabresi & Prakash, *supra* note 19, at 596 n.210.

For an insightful and comprehensive discussion about the Opinion Clause, see Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647 (1996).

execution their respective powers. The President and the judiciary lack such explicit authority. On their own, they arguably cannot assume all incidental powers necessary and appropriate to carry into execution their own powers, because unlike Congress, they lack a generic necessary and proper authority to utilize incidental powers. Based on this argument and other claims, Professor Van Alstyne concluded that "a claim of executive (or judicial) privilege that can stand on no firmer footing than that such privilege might be 'reasonably appropriate' in light of the President's or the federal courts' constitutional duties should be held to require" an authorizing congressional act.<sup>80</sup>

We should not criticize Professor Van Alstyne's view of the Necessary and Proper Clause as some Johnny-come-lately, never-before-heard or made argument. Professor Van Alstyne convincingly demonstrates that Chief Justice John Marshall, after *McCulloch v. Maryland*,<sup>81</sup> concluded that certain incidental powers were not ceded to the judiciary and had to be conferred through legislation passed under the auspices of the Necessary and Proper Clause.<sup>82</sup> Such arguments have obvious implications for incidental powers generally and for incidental executive powers as well.

In *Wayman v. Southard*,<sup>83</sup> the Supreme Court considered whether federal court-established rules for executing federal court judgments would supersede contrary state rules.<sup>84</sup> In the course of considering the propriety of such rules, Chief Justice Marshall did not rely upon any inherent judicial authority to create rules relating to the execution of judgments.<sup>85</sup> Rather, the Court drew upon a federal statute that ceded authority to the courts and then justified the propriety of this statute by reference to the Necessary and Proper Clause: "That a power to

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80. Van Alstyne, *supra* note 7, at 128. As we shall see, Professor Van Alstyne does not deny that the other branches may have some incidental powers. See *infra* note 104 and accompanying text.

81. 17 U.S. (4 Wheat.) 316 (1819). Professor Van Alstyne also believes that *McCulloch v. Maryland* itself supports his reading of the clause. See Van Alstyne, *supra* note 7, at 110. Indeed, Justice Marshall discusses the power of Congress under the Necessary and Proper Clause to punish perjury or stealing/falsifying court records. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 417.

82. See Van Alstyne, *supra* note 7, at 122.

83. 23 U.S. (10 Wheat.) 1 (1825).

84. See *id.* at 21.

85. See *id.* at 22.



make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this [Necessary and Proper Clause], seems to be one of those plain propositions which reasoning cannot render plainer."<sup>86</sup> Marshall also rejected a non-delegation claim to the federal statute that ceded authority to the judiciary to create execution-of-judgment rules.<sup>87</sup> Once again, he did so not on the ground that the judiciary possesses the inherent authority to create such rules, but on the ground that Congress could delegate this "legislative" power.<sup>88</sup> Thus, Chief Justice Marshall repeatedly refrains from asserting that the judiciary has the inherent power to make such rules, even though such a claim would have quickly disposed of many of the arguments confronting the Court. As Professor Van Alstyne asserts: "The assumption seems very clear that though the power pertained intimately to the judicial business, it must be given by Congress to be exercised at all (because the sweeping clause so requires)."<sup>89</sup>

Professor Van Alstyne also reviews Chief Justice Marshall's anonymous essays defending *McCulloch v. Maryland*.<sup>90</sup> The essays highlight the folly of those who believed that the Court was too willing to find particular legislation "necessary." In one essay, Marshall concludes that the Necessary and Proper Clause permits Congress to punish those who falsify judicial records.<sup>91</sup> In another, Marshall adds that Congress may criminalize perjury or subornation of perjury pursuant to the clause.<sup>92</sup> In both essays, Marshall underscores that a strict view of "necessary" makes it impossible for the federal government as a whole to criminalize perjury, etc.<sup>93</sup> Inescapably, Marshall's propositions are premised on the assumption that the judiciary lacks the inherent or incidental authority to punish those who might poison judicial proceedings with false documents or perjurious

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86. *Id.*

87. *See id.* at 42.

88. *See id.* at 44-45.

89. Van Alstyne, *supra* note 7, at 125.

90. *See id.* at 125-27.

91. *See* GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 99 (1969).

92. *See id.* at 173.

93. *See id.* at 99.

statements. His arguments make no sense if the judiciary could create its own execution of judgment and perjury rules.

Perhaps more relevant to originalists, at least some in the founding era understood that the Sweeping Clause had a horizontal component as well. That is to say, they recognized that it would be used to assist the other federal branches, sometimes for good and other times for ill. As in Chief Justice Marshall's essays, implicit in these discussions was the view that the relevant branch did not already possess certain incidental powers, notwithstanding their explicit constitutional authorities.

For instance, Alexander Hamilton commented on the ability of Congress to use the Necessary and Proper Clause to assist the President. Responding to those who insisted that the Constitution would not permit the use of the *Posse Comitatus* to help execute federal law, Hamilton cited the Necessary and Proper Clause: "It would be absurd to doubt that a right to pass all laws necessary and proper to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws."<sup>94</sup> Although left unsaid, Hamilton understood that the President would lack the inherent authority to employ the *Posse Comitatus*. Otherwise, Hamilton simply would have asserted that the President had the incidental authority to call out the *Posse Comitatus* on his own.

The Anti-Federalist Brutus anticipated the arguments Chief Justice Marshall made in defense of *McCulloch v. Maryland* when he observed that the interaction of the Necessary and Proper Clause and the judicial power would enable Congress to enact laws providing for execution of a judgment against a state:

I presume the last paragraph of the 8th section of article I, gives the Congress express power to pass any laws they may judge proper and necessary for carrying into execution the power vested in the judicial department. *And they must exercise this power, or otherwise the courts of justice will not be able to carry into effect the authorities with which they are invested.* For the constitution does not direct the mode in which the courts are to proceed, to bring parties before them, to try causes, or to carry the judgment of the courts into execution.<sup>95</sup>

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94. THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966).

95. *Brutus XIII* (February 21, 1788), in 2 DEBATE ON THE CONSTITUTION,

The Anti-Federalist Agrippa drew an extremely erroneous conclusion about the extent of federal power when he insisted that diversity jurisdiction coupled with the Necessary and Proper Clause would permit Congress to "legislate for all kinds of causes respecting property between citizens of different states."<sup>96</sup> Nevertheless, implicit in his assertion was the conclusion that the judiciary would not be able to create such rules in the absence of the Necessary and Proper Clause. That is to say, courts would not be able to determine rules of decision for diversity cases in the absence of the Necessary and Proper Clause.

To be sure, none of these individuals speak to the propriety of executive privilege. Nor do they entirely doom the whole enterprise of recognizing some incidental powers that might be considered part of authorities outside Article I. At the same time, they do speak to the fate of at least some incidental powers that might otherwise be derivable from authorities outside Article I. These discussions by Marshall, Hamilton, and Anti-Federalists make no sense unless these arguments assume that only Congress may cede the relevant power and that the empowered branch would otherwise be powerless.

Couple the foregoing discussion with the earlier arguments made about far more central incidental powers of funding and officers and you have a forceful case against a vast array of incidental authorities that might appertain to, or seem inherently part of, the constitutional authorities of the federal judiciary and the President. Some of the most significant incidental powers (funding and appointing officers) are not left to the executive and judicial branches. Congress must provide. Discussions during ratification and post-ratification confirm this. Moreover, other incidental powers not explicitly ceded to Congress are thought to reside with Congress nonetheless by virtue of the Necessary and Proper Clause. Underlying such views is the assumption that the relevant branch cannot insist that it already enjoys the allegedly inherent, incidental, or indispensable authority. Indeed, if another branch possibly could exercise such authority, congressional action always would be entirely un-"necessary." Congress need never provide any incidental authority for the other branches if the other

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*supra* note 44, at 222, 225 (emphasis added).

96. *Agrippa XII* (January 11, 15, 18, 1788), in 1 DEBATE ON THE CONSTITUTION, *supra* note 44, at 762, 767.

branches already command all the incidental powers of executing their constitutional authorities.

One might find these arguments about the negative implications of the Necessary and Proper Clause unconvincing, even radical. Nevertheless, one must acknowledge that we currently treat the Necessary and Proper Clause as having negative implications with respect to incidental powers. For instance, although we rarely acknowledge this, we view the Clause as proof that only Congress may create executive officers and departments via legislation and that the President lacks such authority. Indeed, there is no other clause that authorizes the creation of "inferior" executive officers<sup>97</sup> or one that permits Congress to "raise" executive offices.<sup>98</sup> Nor is there a provision that prohibits the executive creation of officers and departments. Extending these negative implications of the Necessary and Proper Clause to executive privilege should hardly be considered radical.

With these arguments in mind, let us return to our arguments for privilege based on implications from the text and structure. Recall that there are three related claims. Executive privilege is inherent, is crucially necessary, and/or results from constitutional penumbras that generate some sort of synergy. As we shall see, in the face of absolute congressional control over the most important means of execution and in the teeth of the negative implications of the Necessary and Proper Clause, none of the three assertions seems that persuasive.

## B. CONSIDERING THREE OF THE ARGUMENTS FOR PRIVILEGE

### 1. An Inherent Executive Privilege

Regarding the first claim for executive privilege, it is hard to believe that such a power is inherent in the President's office. An inherent attribute of an object is a trait that necessarily inheres in that object. The characteristic must be "involved in the constitution or essential character" of the object or "belong by nature or settled habit."<sup>99</sup> For instance,

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97. *Cf.* U.S. CONST. art. I, § 8, cl. 9 (discussing Congress's power to create "inferior" tribunals).

98. *Cf.* U.S. CONST. art. I, § 8, cl. 12 (granting Congress authority to "raise" armies).

99. WEBSTER'S NEW COLLEGIATE DICTIONARY 432 (1956).

water is inherently wet because wetness is one of the necessary traits of water. Analogously, to assert that the executive enjoys an executive privilege, one would have to show that the privilege is part of the essential nature of the office of the President.<sup>100</sup> However, it simply seems impossible to insist that executive privilege is an "essential character" of or belongs "by nature" to the office of the President. To be sure, without executive privilege, the President would be hampered, to some extent, in carrying out his powers. Yet there can be no doubt that the President would be able to fulfill his constitutional duties without such a privilege. He would still be able to veto legislation, receive ambassadors, and execute the laws. Accordingly, while no one can deny that water is wet, it is easy enough to reject the notion that executive privilege is so inextricably tied up with the office of the President that you cannot have our Constitution's President without executive privilege.<sup>101</sup>

## 2. A Necessary Executive Privilege

Of course, the arguments made in Part II.A probably have the most direct bearing on the claim that the President must enjoy executive privilege because such authority is necessary for carrying out the President's Article II powers and functions. Mere utility cannot be sufficient to guarantee the use of all incidental powers. As we have seen, something can be absolutely indispensable and yet still unavailable to the President as a matter of course. Indeed, if all necessary powers were vested with the President as a matter of right, the President would be able to expend funds, raise armies and create offices at will. Given the reality that far more central

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100. We consider whether privilege exists by reason of habit or history in Part III.

101. Perhaps the most obvious inherent authority of a chief executive is the power to execute federal law. *See generally* Calabresi & Prakash, *supra* note 19. Indeed, even in the absence of the Take Care Clause and the vesting of executive power, anyone commonly labeled the "Chief Executive" would enjoy the inherent right to execute the law. Admittedly, one is hard pressed to think of other inherent authorities that our President must enjoy. As mentioned earlier, I think that the President must have a right to air. *See supra* text accompanying note 20. Similarly, the President's salary protections in Article II, Section 1, Clause 7 assuredly ensure that the President has the wherewithal to secure food and drink. Additionally, given his textual powers, the President should have the unrestricted freedom to enforce the laws personally, to draft and deliver legislation personally, and to convey vetoed legislation personally.

and significant means are not available to the President automatically, surely the less weighty executive privilege ought to be viewed as outside the realm of incidental presidential powers as well. At the very least, an argument based on utility cannot carry the day on its own. Some other arguments (e.g., historical) must be brought to bear.<sup>102</sup>

### 3. A Penumbra Executive Privilege

Finally, it is difficult to believe that executive privilege emanates from the synergies arising from Article II penumbras. In no other area that I am aware of, do we treat these Article II authorities as generating any synergistic penumbras that cede still more power to the President. To be sure, the President is made more powerful by each additional authority and the authorities interact in interesting ways. Yet we do not recognize additional authorities stemming from the interaction of the acknowledged powers. We never admit that the President's constitutional authority is more than the parts.<sup>103</sup>

In the end, I think that Professor Van Alstyne had it right when he concluded that "[o]nly when the particular assertion of privilege can fairly be said to be the least adequate power a

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102. This argument about "utility" may seem to be in tension with the arguments that Steven Calabresi and I made about presidential removal of subordinate executive officials. See Calabresi & Prakash, *supra* note 19, at 596-99. To the extent that our discussion of removal was only grounded on "common sense" about removal, the criticism has bite. We were careful, however, to tether our removal argument to text. With little discussion, we ultimately claimed that the power to remove executive officers was part of the President's "executive Power" under the Article II Vesting Clause. *Id.* at 598. We also adopted a secondary position to the effect that the President should be able to withdraw executive authority even if he cannot fire an official. Because the executive power is the President's, the President can surely withdraw such authority without any congressional authorization. See *id.* at 598-99. Thus, although we spoke about the absurdity of having no presidential means of removing his subordinates, neither of our principal arguments ultimately depended solely upon on the supposed necessity or utility of removal.

103. Of course, constitutional penumbras and synergies are often thought to form the basis for a constitutional right to privacy. See *Roe v. Wade*, 410 U.S. 113, 129 (1973). Needless to say, such arguments are highly controversial. In any event, there are far better reasons to support the existence of penumbral and synergistic constitutional rights than there are for the existence of penumbral or synergistic executive or judicial powers. While the Constitution reflects an enumerated power strategy, it does not reflect an enumerated rights strategy, whereby the Constitution codifies all rights against the government.

President (or a federal court) clearly must have to perform express duties enumerated in the Constitution" can the claim of an inherent, necessary or penumbral power be respected.<sup>104</sup>

As I have tried to argue, executive privilege falls far short of this standard. While undoubtedly useful, executive privilege can hardly be regarded as indispensable to carrying into execution the President's Article II functions. Indeed, executive privilege is far more dispensable than supplies, funds and officers. Were we to redraft the Constitution, we would be far more likely to codify some level of monetary and personal support for the Chief Executive. If executive privilege was on the list at all, it would be somewhere at the end of the list, just above the provision of a place to live (e.g., the White House).

Unlike Professor Van Alstyne, however, I doubt whether accepting this view of incidental powers could ever fully resolve the dispute about executive privilege's bona fides. By itself, an *expressio unius* argument made about the Necessary and Proper Clause hardly dooms executive privilege or any other claimed incidental power. Nor do the Constitution's telltale signs that Congress controls the most significant means of execution spell the end of executive privilege or any other privilege. We still must judge whether executive privilege is part of the historical understanding of executive power.<sup>105</sup> Indeed, if the Constitution's vesting of executive power includes the authority to keep communications secret, then we are not speaking of an inherent, necessary, or penumbral right,

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104. Van Alstyne, *supra* note 7, at 128. Professor Van Alstyne's point might track with Governor Edmund Randolph's assertion during the Constitution's ratification. See *Governor Edmund Randolph on the "Necessary and Proper" Clause, Implied Powers, and Bill of Rights* (June 17, 1788), in 2 *DEBATE ON THE CONSTITUTION*, *supra* note 44, at 709, 709-10. In the course of criticizing those who minimized and those who inflated the significance of the Necessary and Proper Clause, Governor Randolph insisted that the Necessary and Proper Clause could not be merely about incidental powers because if it was only about incidental powers it would be superfluous. See *id.* at 710. "That the incident is inseparable from the principal, is a maxim in the construction of laws." *Id.* at 709. With respect to the President, "who has certain things annexed to his office. Does it not reasonably follow, that he must have some incidental powers?" *Id.* at 710. In other words, because the President (and all three branches) must enjoy some incidental powers, the clause must be more than about mere incidental powers because that would make it a "tautology." A power is incidental and thus tags along, however, only if we can deem it "inseparable" from one of the Constitution's explicit powers.

105. As noted earlier, I do not consider whether executive privilege might be defended on the basis of some more narrow Article II provision.

but a right ceded by the Constitution's text. The only way to assess if the executive power originally encompassed a right to secrecy is to examine history. The next Part turns to this inquiry.

### III. HISTORY AND THE PRIVILEGE

In this Part we search for indications that executive privilege was one of the well-known attributes of the President and for evidence that privilege fits comfortably within Article II, Section 1's executive power. We also explore the instances in which President Washington allegedly asserted executive privilege. This Part will not examine claims of executive privilege after Washington's administration for the simple reason that the further we move away from the ratification period, the more removed we may become from original understandings. Indeed, even probing the Washington administration is problematic. Once in office, Presidents will tend to have their constitutional interpretations colored by political expediency. Likewise, Congress may dispute obviously proper presidential prerogatives for no other reason than to gain the upper hand in inter-branch disputes. Put simply, after ratification, institutional rivalries and political considerations often distort constitutional interpretation.<sup>106</sup>

#### A. PRE-RATIFICATION EVIDENCE

To my knowledge, prior to the Constitution's drafting there was no general consensus that the executive enjoyed an executive privilege to refuse to provide information to Congress and the courts. In his book on the subject of privilege, Professor Berger insists that there was no English or state tradition of an executive's refusing to reply to congressional or judicial requests for information.<sup>107</sup> Professor Rozell does not seem to challenge that assertion in his book.<sup>108</sup> Professor

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106. See Calabresi & Prakash, *supra* note 19, at 558-59 (observing that post-ratification legislative history is suspect for these reasons).

107. See BERGER, *supra* note 1, at 15-34. Worth noting is that the Continental Congress asserted—via statute—that it could review all papers belonging to the Secretary of Foreign Affairs. See *id.* at 34. Of course the difficulty of viewing this practice as precedent for the U.S. Constitution is obvious. Unlike the U.S. Constitution, the Articles of Confederation did not create an independent executive branch with powers and authorities unalterable by statute.

108. See ROZELL, *supra* note 1, at 22-32.



Sofaer, however, avers that the English Crown "claimed the right to withhold material in its discretion" and that parliamentary requests for information on the proceedings in the Cabinet were rejected as improper. At the same time, although he maintains that the Parliament generally allowed the King and his ministers to operate with secrecy, he also admits that Parliament "sometimes punished ministers and even Kings" for withholding information.<sup>109</sup> On the relevance of British practices, Sofaer suggests that due to "drastic fluctuations in power, it is hardly surprising that British constitutional practice fails to provide one-sided answers to the questions left unresolved by the language of the U.S. Constitution."<sup>110</sup> In any event, assume that English and state executives<sup>111</sup> refused to divulge certain information to the legislative branch and that they did so with legislative approbation. We would still face the task of determining if such practices found their way into the Constitution.<sup>112</sup>

The Philadelphia convention and the ratification struggle are not of much help either. I am not aware of any explicit assertion during the Constitution's drafting or ratification that the President would enjoy a constitutional right to secret communications. On the other hand, I am aware of a speech by James Wilson that casts rather grave doubts on executive privilege. Regarded by many as the most important framer in the creation of the Constitution's Presidency,<sup>113</sup> Wilson praised the salutary effects of a single executive authority:

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109. SOFAER, *supra* note 18, at 10-11. Professor Sofaer even notes that the House of Commons jailed Nicholas Paxton, Solicitor of the Treasury, on the ground that he refused to testify. *See id.* at 82; *see also* BERGER, *supra* note 1, at 170 (same).

110. SOFAER, *supra* note 18, at 8.

111. For the most part, state executives were much weaker than the Constitution's federal executive. *See* CHARLES THACH, *THE CREATION OF THE PRESIDENCY* 52 (1969). Given this reality, one might be more favorably disposed to conclude that if state executives enjoyed a privilege, the President should enjoy it as well.

112. Admittedly, under these circumstances (which do not appear to obtain), I believe we would adopt the position that the Executive possesses an executive privilege. After all, a widely-shared understanding of an executive power might be thought part of the Constitution's grant of executive power.

113. *See* Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 998 n.42 (1993) (citing various authorities that highlight Wilson's pivotal role at the Philadelphia Convention).

The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality . . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.<sup>114</sup>

Wilson's speech reveals quite a bit. Wilson points out that the President cannot hide his negligence or criminality because he has no screen. More importantly, he insists that the President does not have any privileges. Although executive privilege was not typically labeled a "privilege" in this era, Wilson may have been referring to privileges like judicial immunity from suit and what we call executive privilege. Given Wilson's prominent role in creating the Presidency, his comments might count as a small factor against executive privilege.<sup>115</sup>

Why were there not more discussions about executive privilege? With so many issues being bandied about, it is scarcely surprising that the founding generation might not have denounced every possible pretension to authority or, alternatively, affirmed the legitimacy of every implied or express (though obscure) power.<sup>116</sup>

Professor Rozell does observe that several members of the founding generation commented favorably on the executive's ability to act with secrecy.<sup>117</sup> I do not deny the existence of

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114. James Wilson, Remarks at Pennsylvania Ratifying Convention (Dec. 4, 1787), reprinted in 3 THE FOUNDERS' CONSTITUTION 501 (Philip B. Kurland & Ralph Lerner eds., 1987).

115. Notwithstanding the significant role Wilson played in creating our Presidency, Wilson's comment, by itself, cannot carry the day when it comes to demonstrating the impropriety of legislative privilege.

116. Professor Rozell makes the latter claim quite well: "It seems more plausible that the Framers understood secrecy as so obvious an executive power—and a judicial one, too—that there was no need for a specific grant of that power in the Constitution." ROZELL, *supra* note 1, at 27-28. Of course, sometimes, the Framers discussed obvious points ad nauseam. See Calabresi & Prakash, *supra* note 19, at 607-11 (discussing the repeated insistence of the Framers that the President had the power to execute the laws).

117. See ROZELL, *supra* note 1, at 27-28. He cites the *Federalist Papers* as reflecting the assumption that the President could or would act under cover of secrecy. See *id.* (citing THE FEDERALIST NO. 64 (John Jay) and NO. 70 (Alexander Hamilton)). Of course, there are numerous other examples. See *Answers to Mason's "Objections": "Marcus" [James Iredell] I-V* (Feb. 20-Mar. 19, 1788), in 1 DEBATE ON THE CONSTITUTION, *supra* note 44, at 363, 380 ("One of the great advantages attending a single Executive power is, the

such an ability. I celebrate it. Such assumptions, however, hardly demonstrate that the proposed executive would enjoy a constitutional right to an executive privilege.<sup>118</sup> Numerous individuals also discussed the executive's superior capacity to act with energy and dispatch.<sup>119</sup> Nonetheless, we do not construe these discussions as indicating that the executive thereby enjoys a constitutional right to act energetically or to act with dispatch.

These discussions about executive secrecy merely reflect one of the common attributes of a single executive as opposed to a plural legislature. In the ordinary course, the President would be able to keep some matters secret because it would be easier for a branch superintended by one individual to keep confidences. Moreover, for the most part, he would not need to disclose the information. Generally, Congress and the courts would not have occasion to require the disclosure of executive communications. Such sound institutional reluctance to demand the content of communications hardly demonstrates that the President enjoys a privilege to keep information secret.<sup>120</sup> And, of course, practice bears this out. Notwithstanding the controversial nature of executive privilege, Congress and the courts have not always sought every document or communication that the President thought best kept secret.<sup>121</sup>

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degree of secrecy and dispatch with which, on critical occasions, such a power can act."). Iredell goes on to comment that secrecy enables the President to employ double agents to infiltrate enemies. *See id.* at 380-81. *But cf. Governor Edmund Randolph's Reasons for Not Signing the Constitution* (December 27, 1787), in 2 *DEBATE ON THE CONSTITUTION*, *supra* note 44, at 595, 603 (observing that Senate will not be able to act with the secrecy, dispatch or vigour requisite for its executive functions).

118. *See* DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS* 34 (1981) (observing that no one suggested that secrecy would be "absolute").

119. *See* THE FEDERALIST NO. 64 (John Jay); THE FEDERALIST NO. 70 (Alexander Hamilton); *see also* *Answers to Mason's "Objections": "Marcus" [James Iredell] I-V*, *supra* note 117, at 380.

120. The argument I make necessarily suggests that Congress might demand the President to lay bare all his official communications. In the absence of a just cause, such a blanket command surely would be wrong-headed. But such a statute would be no more unconstitutional than if the Congress failed to fund the executive office of the President. That is to say, it would not be unconstitutional at all.

121. *See* SOFAER, *supra* note 18, at 81-82. Professor Sofaer even notes that early requests for information included language that indicated that the President should lay documents before the relevant chamber "as he may think

In the end, there is surprisingly little direct pre-ratification evidence bolstering the case for executive privilege. At best, English practice is mixed. Moreover, during the ratification fight no one ties executive privilege to executive power. Instead, James Wilson goes so far as to declare that the President lacks any privileges. Proponents of executive privilege have very little pre-ratification evidence to support their cause.

## B. THE WASHINGTON ADMINISTRATION

Anyone casting doubt on the propriety of privilege must inevitably confront the question of what to make of President Washington's supposed post-ratification claims of executive privilege. Naturally, Professor Rozell asserts that President Washington "established precedents" for executive privilege by Washington's consideration of and response to three congressional requests for information.<sup>122</sup> A closer examination of these episodes, however, suggests that as constitutional precedents go, these incidents leave much to be desired. While some aspects of the history may support the propriety of executive privilege, other parts could be cited for the opposite conclusion, i.e., to deny the legitimacy of a privilege.

### 1. The St. Clair Incident

The St. Clair incident concerned the massacre of an entire division of the army under the leadership of General Arthur St. Clair.<sup>123</sup> The House resolved to investigate the Army's failings and appointed a committee. The committee called upon Secretary of War Henry Knox to turn over documents relating to the massacre. Knox notified President Washington who then called a cabinet meeting. Apparently, the President was worried that "there might be papers of so secret a nature that they ought not to be given up."<sup>124</sup> Jefferson's private notes from the cabinet meeting suggest that the cabinet agreed on four points:

1. That the house was an inquest, therefore might institutes inquiries.
2. That it might call for papers generally.

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proper." *Id.*

122. ROZELL, *supra* note 1, at 33, 34-36.

123. See HOFFMAN, *supra* note 118, at 70-71.

124. *Id.* at 73.

3. That the Executive ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion.
4. That neither the committees nor the House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

In the end, however, Jefferson's notes indicate that the Cabinet resolved that "there was not a paper which might not be properly produced" and thus no confrontation would be necessary.<sup>125</sup>

Although some doubt that these deliberations were ever made public,<sup>126</sup> there may be reasons for concluding that at least some of the cabinet's discussions may have been disclosed through back-channels. Two days after the cabinet meeting, the House resolved that the President "be requested to cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair."<sup>127</sup> Because the House now directed a request to the President and because it was qualified (only papers of a "public nature" were sought), Professor Sofaer believes that word of the Cabinet meeting leaked. Was Congress acceding to the Cabinet's conclusions? Perhaps. On the other hand, if all the Cabinet's pronouncements had been true and universally acknowledged, there would have not been a need to qualify the House's request. In other words, on one view, the House sanctioned presidential discretion to withhold certain documents because the House was of the view that it normally had a right to demand and receive all executive papers. Else why the need to authorize presidential discretion at all?<sup>128</sup> The President could have refused such papers on his own.

What does seem reasonably clear is that neither Jefferson's notes nor the conclusions of the Cabinet meeting

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125. THE COMPLETE JEFFERSON 1223 (Saul K. Padover ed., 1943).

126. See BERGER, *supra* note 1, at 169.

127. 2 ANNALS OF CONGRESS 536 (1792).

128. Indeed, following vigorous disputes about presidential removal of executive officers, Congress passed statutes that did not grant a removal power but instead assumed the President had such authority by virtue of the Constitution. See, e.g., Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67.

were conveyed to the Congress. Nor did Jefferson's notes make their way into government files. Perhaps most importantly, the President never openly asserted a right to withhold information and, in fact, the President transmitted *all* relevant documents.<sup>129</sup> Given this background, it becomes much harder to use Jefferson's notes as a strong precedent for executive privilege. Indeed, the episode more clearly seems like a precedent for executive compliance with congressional demands for information and evidence of a congressional view that Congress could cede a non-redundant discretion to the Executive to withhold documents.<sup>130</sup>

## 2. The Gouverneur Morris Incident

The second incident does not suffer from the same set of problems and possibly stands out as a better precedent for executive privilege. In January 1794, the Senate called upon Secretary of State Edmund Randolph to supply correspondence between Gouverneur Morris, U.S. Ambassador to France, and Randolph.<sup>131</sup> The request was likely an attempt to embarrass Morris as the correspondence was thought to contain embarrassing and disparaging comments about French leaders and the French Republic generally.<sup>132</sup> There also may have been suspicions (later confirmed) that Morris had been part of a scheme to smuggle Louis XVI out of France.<sup>133</sup> In any event, the Senate later amended and redirected the proposal, requesting that the President furnish the correspondence.<sup>134</sup>

President Washington grew quite concerned that disclosure of the correspondence would damage relations with France and called a cabinet meeting. Once again, there were cabinet discussions supporting the President's right to withhold documents.<sup>135</sup> Edmund Randolph even sought the advice of Justice James Wilson and Representative James

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129. See BERGER, *supra* note 1, at 168-69; HOFFMAN, *supra* note 118, at 74-76.

130. See BERGER, *supra* note 1, at 169 & n.34.

131. See 3 ANNALS OF CONGRESS 34 (1794).

132. See HOFFMAN, *supra* note 118, at 104-05.

133. See *id.* at 116.

134. See 3 ANNALS OF CONGRESS 88 (1794).

135. See HOFFMAN, *supra* note 118, at 108-09. Wilson's view seems at odds with his prior statement regarding presidential privileges. See *supra* note 114 and accompanying text.

Madison, both of whom believed that Washington could withhold information that he thought imprudent to disclose.<sup>136</sup>

Perhaps bolstered by his cabinet discussions, Washington had his aides transmit redacted correspondence with the following explanation: "After an examination of [the papers], I directed copies and translations to be made; except in those particulars which, in my judgment, for public considerations, ought not to be communicated."<sup>137</sup> The excisions mostly related to confidential informants and embarrassing commentary written by Morris about French politicians, society, and intrigue. For example, Morris's comment that "[t]he best picture I can give of the French nation is that of cattle before a thunder storm"<sup>138</sup> never found its way to the Senate. Moreover, as Rozell notes, the Senate never saw fit to challenge the President's open withholding of information.<sup>139</sup> Failing to challenge the President's redactions could have signaled the Senate's admission that the President enjoyed a power to keep certain communications secret.

Of course, other explanations are readily available. First of all, the Senate's unwillingness to challenge Washington's deletions may have reflected nothing more than a changed political calculus. Albert Gallatin had been part of the slim two-vote majority seeking the Morris documents and had subsequently left the Senate.<sup>140</sup> Moreover, the Senate simply may not have had the stomach to challenge Washington. Washington was, after all, the acknowledged father of the country. Finally, it is entirely possible that the Senate found the furnished materials sufficient for the Senate's needs. Nevertheless, although it is difficult to draw definitive conclusions, Washington seemed to withhold information even in the absence of legislative authorization.<sup>141</sup>

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136. See HOFFMAN, *supra* note 118, at 109-10.

137. 3 ANNALS OF CONGRESS 56 (1794).

138. HOFFMAN, *supra* note 118, at 112 (citation omitted).

139. See ROZELL, *supra* note 1, at 35.

140. See HOFFMAN, *supra* note 118, at 117.

141. It should be noted that Washington may have thought that the Senate conferred implicit authority to withhold information given his prior experience with the House. See *supra* notes 123-30 and accompanying text. Indeed, Attorney General Bradford argued that every general request of information should be construed to permit "those just exceptions which the rights of the Executive and the nature of foreign correspondence require." SOFAER, *supra* note 18, at 84. In other words, the President should not suppose that "the Senate intended to include any letters, the disclosure of

### 3. The John Jay Incident

The third incident during the Washington administration involved an appropriation request meant to fulfill obligations to England under the Jay Treaty and witnessed a head-on confrontation between the House and the President. President Washington sent Chief Justice John Jay to England to negotiate a treaty to normalize relations. The resulting Jay Treaty was quite controversial, particularly so because Jay was viewed as violating his instructions and because the treaty was thought favorable to the English. Nevertheless the Senate ratified and the President, amidst much public pressure to renegotiate the treaty, signed it.

Washington subsequently sought the House's approval for an appropriation to fund the Jay Treaty's arbitral commissions.<sup>142</sup> To judge whether America's treaty obligations should be satisfied, Representative Edward Livingston proposed a resolution, requesting a copy of the negotiation instructions given to Chief Justice Jay.<sup>143</sup> Later on, Livingston amended his motion based on the advice of respected "gentlemen" to provide an exception. The President was to hand over the instructions "[e]xcepting such of said papers as any existing negotiation may render improper to be disclosed."<sup>144</sup> What followed was a one-month long debate (stretching over 300 pages in the *Annals of Congress*) that culminated in the passage of Livingston's modified request.<sup>145</sup>

Perhaps the exception was too narrow because Washington refused outright. Fortunately he did provide reasons for his decision. "I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President, as a duty, to give, or which could be required of him by either House of Congress as a right."<sup>146</sup> Negotiations require caution and secrecy, however. Full disclosure, even upon completion

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which might endanger national honor or individual safety." *See id.* (quoting 4 WORKS OF ALEXANDER HAMILTON 494-95 (J. Hamilton, ed. 1850-51)). Finally, Professor Sofaer claims that many requests from the chambers contained language similar to the House's authorization of discretionary presidential withholding. *See id.* at 81.

142. *See* SOFAER, *supra* note 18, at 86.

143. *See* 4 ANNALS OF CONGRESS 400-01 (1796).

144. *Id.* at 424.

145. *See id.* at 759-60.

146. *Id.* at 760.



"would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers."<sup>147</sup> Indeed, such concerns led the Framers to vest the treaty power with the President and the Senate only. Given these realities, to accept "a right in the House of Representatives to demand, and to have, as a matter of a course, all the papers respecting a negotiation with a foreign Power; would be to establish a dangerous precedent."<sup>148</sup> President Washington's analysis did not end there, however. "It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed."<sup>149</sup> President Washington ended his letter with his view that "a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request."<sup>150</sup>

At first blush, Washington's response may seem like the dead-on assertion of executive privilege that is sorely lacking in the other incidents. Closer inspection reveals otherwise. Washington's letter is not grounded on anything resembling executive privilege. He never insists that he may withhold information whenever he feels it necessary to do so. His refusal is grounded on the supposed lack of power in the House to demand the papers. Because the House was not involved in the treaty process, it had no right to the papers. He buttressed this point (and his sincerity) by highlighting that he had provided all the relevant papers to the Senate during its consideration of the Treaty.<sup>151</sup>

In addition, the beginning of his letter points to his consistent practice of disclosure in a manner that manifests a belief in a congressional right to executive information. He asserts that he has always conveyed information that Congress had a right to expect. In other words, he agrees that the Congress has at least some constitutional right to information

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 762.

151. *See id.* at 761.

from the executive and he insists that he has always honored this right.

Finally, he pointedly notes the absence of an indication that the House was considering impeachment.<sup>152</sup> The only reason to mention this is to indicate that he would have complied with the request had the House been considering impeachment. Otherwise, the impeachment reference is merely a diversion. Because Washington never asserts a right to maintain the secrecy of executive communications, it is difficult to escape the conclusion that the Washington letter is not about privilege at all. Rather, his letter is about the alleged lack of authority behind the House's request. In this instance at least, Washington likely believed that the House had no more power to request the treaty papers than any common citizen.

An early draft of the letter eventually sent to Congress bolsters the above reading. The draft forthrightly maintained that "a discretion in the Executive Department, when and how to comply with such demands is essential to the due conduct of foreign negotiations."<sup>153</sup> The deletion of this statement makes a world of difference. Without it, the letter reads entirely as Washington's rejection of the House's *authority* to demand the treaty instructions rather than as a letter declaring that the President enjoys the generic constitutional authority to withhold information.<sup>154</sup>

Of course, that was not the end of the story. The House hardly took the letter in good humor. After all, the House had debated at tremendous length the propriety of its request for information. Thomas Blount proposed the passage of two separate resolutions asserting the House's right to demand papers.<sup>155</sup> The first affirmed the House's role in implementing treaties via legislation.<sup>156</sup> The second resolution insisted that the House need never declare the purposes or application of the information, so long as the information related to the

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152. *See id.*

153. SOFAER, *supra* note 18, at 91.

154. Even with the phrase, however, the letter would have made two separate arguments that would not have meshed very well.

155. *See* 4 ANNALS OF CONGRESS 771-72 (1796).

156. *See id.* at 771.

"Constitutional functions of the House."<sup>157</sup> The House approved both.<sup>158</sup>

Again, this precedent serves as a bad precedent for executive privilege. Though he refused to hand over any documents, President Washington asserted no executive privilege but instead pointed to a lack of House authority. He even implied that he would have complied had the House's request referenced a possible impeachment. Moreover, the House itself did not take the President's letter lying down. It asserted its right to the documents. Accordingly, in the only incident in which Washington explained his actions at great length, the President adopted an approach counter to the view that the President enjoys a privilege and indeed suggested that there are instances when Congress has a right to information.

In the end, none of these incidents provides the proper precedent for an executive privilege. In none of them does the President declare that he enjoys a constitutional right to decline to turn over communications to Congress or the courts.<sup>159</sup> Quite obviously, because he does not assert a constitutional right, he certainly does not cite any textual or historical precedents for his actions. Jefferson's notes point to English practice, but as Professors Sofaer and Berger indicate, that evidence actually may suggest that Congress does have the right to any and all papers as the Court of Impeachment.

Of course, there are other executive precedents for executive privilege. We could discuss *Marbury v. Madison*, the actions of Thomas Jefferson, and other bits of evidence. The farther we move from the Constitution's ratification, however, the more likely we are to encounter arguments that do not reflect original meanings and structure. We more likely confront arguments based on expediency or the politics of the

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157. *Id.* at 771.

158. *See id.* at 782-83. Famously, James Madison took issue with President Washington's refusal, while at the same time acknowledging that the President could "withhold information, when of a nature that did not permit a disclosure of it at the time." ROZELL, *supra* note 1, at 36 (quoting 5 ANNALS OF CONGRESS 773 (1796)). Of course, Madison's assertion of privilege went well beyond any claim that Washington openly pressed.

159. Even if Washington claimed the right to withhold communications, we would still have to resolve whether Washington's claims were consonant with common understandings or whether they were aberrations. As Steve Calabresi and I have argued elsewhere, there are reasons to question an interested branch's construction of its own powers. *See Calabresi & Prakash, supra* note 19, at 558.

moment. In any event, this comment is not the proper forum for considering the country's entire experience with executive privilege. Professor Rozell already has done a wonderful job of that.<sup>160</sup>

### SOME CONCLUDING THOUGHTS

Publius presciently cautioned "that no skill in the science of Government has yet been able to discriminate and define with sufficient certainty, its three great provinces, the legislative, executive and judiciary; or even the privileges and powers of the different Legislative branches."<sup>161</sup> In some respects, the Constitution did not make the task appreciably easier. Indeed, more than two centuries of conflict over the propriety of executive privilege underscores the truth of Publius's counsel.

Nevertheless, the arguments laid out above are meant to advance the debate by submitting reasons for doubting the legitimacy of executive privilege under our Constitution's peculiar structure. Congress plainly controls most of the more significant means of executing executive authority: the purse, the raising of armed forces, and the creation of executive officers and departments. Without these means, the President resembles Charles Black's minimalist President.<sup>162</sup> Given Congress's control of these vital means, one might infer that Congress generally resolves whether the President will enjoy powers that seem incidental to his constitutional powers. In particular, one could conclude that Congress must judge, via legislation, if it is necessary and proper for the President to utilize an executive privilege.

Arguably, the only obvious exceptions to congressional control of these incidental powers would concern those subsidiary powers that are absolutely necessary to the President's personal execution of his presidential powers. For instance, the President must enjoy some freedom of movement because he must be able personally to enforce federal law, veto, and propose legislation. Outside such narrow incidental

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160. See generally ROZELL, *supra* note 1.

161. THE FEDERALIST NO. 37, at 228.

162. See Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15 (1974) (observing that Congress could choose to limit the President's staff to one secretary for social correspondence and by two-thirds vote put the White House up for auction).

powers, perhaps the President must seek congressional assistance. On one view, an executive privilege is not necessary to the personal execution of his duties and thus ought to be left up to Congress.

As we have seen, history does not resoundingly confirm these conclusions. Although James Wilson's comments suggest that the President lacks an executive privilege, no one during the drafting or ratification of the Constitution openly asserted that the President may not conceal information. Nevertheless, there was widespread acknowledgement that Congress would control the purse, the creation of officers, etc. Moreover, there were indications that at least some incidental powers were left for Congress to provide and that the magisterial branches were not empowered to invoke all incidental authorities on their own.

Just as importantly, history does not contradict any of these arguments about privilege. English practice seems decidedly mixed where executive privilege is concerned. State practices provide even less support as there do not appear to be instances in which state executives withheld information from state legislatures or the courts. Nor do there appear to be any framing or ratification discussions confirming the propriety of a privilege. Post-ratification practices of the Washington administration are not much more helpful. Once President Washington complied with an information request after cabinet officials supposedly advised him that he need not. Another time, he openly withheld certain information and the requesting chamber made no response. The final instance marked a notorious and complete refusal to comply, but not on the grounds that the President enjoys a privilege. Instead, in a lengthy letter discussing his refusal, Washington indicated that the House did not have the power to request the particular documents at issue unless the chamber was considering an impeachment. Moreover, he observed that he had complied in the past in instances where the chamber had a right to certain information. Once again, this hardly sounds like an assertion of a constitutional right at all. Rather, this suggests that the President will comply with requests so long as the requesting institution has a right to the information. By implication, this understanding of Washington's letter suggests that if there is to be a privilege, Congress must act in the first instance.

If Congress controls the incidental power of privilege, why has Congress never codified an executive privilege? After all,

such a statute clearly would attest to Congress's considered view that the President does not enjoy a constitutional right to a privilege. Quite simply, Congress may never have wanted to take that fateful step. It is much easier to couch any congressional request for information with sufficient discretion to permit the necessary flexibility.<sup>163</sup> Congress may then fix the amount of flexibility in any given request.<sup>164</sup> Not having codified a privilege, however, has led to a certain amount of uncertainty. Had Washington possessed the statutory right to withhold information that he thought best suppressed, he would have had the unquestioned flexibility to respond to requests for information. Moreover, the statute would have laid solid foundations for the claim that Congress must act before the President could claim a privilege.<sup>165</sup>

I believe that Congress ought to enact such a statute. After debating the values of privilege, legislative investigation, individual rights, and even federalism, Congress could enact the executive privilege it thought most appropriate pursuant to its authority under the Necessary and Proper Clause. Such a codification would go a long way towards eliminating much of the uncertainty that surrounds claims of executive privilege.

Of course, there are some obvious implications of my arguments. First, the arguments suggest that the judiciary does not enjoy a judicial privilege to conceal its conversations and documents. Thus, the Supreme Court's conference notes could be discoverable should someone allege that these conversations constituted a conspiracy to suppress civil rights,

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163. See *supra* note 121.

164. Compare the greater flexibility of the House request in the St. Clair incident, see *supra* note 127 and accompanying text, with the more narrow discretion conveyed in the Jay Treaty episode. See *supra* note 144 and accompanying text.

165. My explanation for congressional inaction does not resolve why Congress has not codified an executive privilege vis-à-vis the judiciary. The only explanation is that Congress never saw fit to enact such a privilege. Not a comforting explanation to be sure. Nevertheless, Congress's failure to codify a privilege does not mean that the Constitution grants such a privilege by its own force. Just a few years ago, the Supreme Court concluded that Congress may grant temporary immunity to the President for suits arising out of the President's unofficial acts. See *Clinton v. Jones*, 520 U.S. 681, 709 (1997). That Congress never had done so before does not call into question the underlying merits of the Court's conclusion that the President is not entitled to temporary immunity from suit. See *id.* at 1650. The Court's conclusion about the propriety of a civil suit arising from the President's private conduct stands or falls on its own merit.

for instance. Likewise, Congress would be able to subpoena judicial documents that might be relevant to the impeachment of a judge.

Second, if my arguments are convincing, it follows that Congress may abuse its authority by refusing to cede a privilege either via statute or by declining to cede discretion when it requests information. Still, as Professor Rozell points out, the possible abuse of power cannot be the sole reason to doubt the existence of a particular power.<sup>166</sup> The very existence of power ensures the opportunity for abuse. Indeed, those who presume the propriety of privilege must cope with the reality that the President could abuse any privilege said to reside in his hands.<sup>167</sup> We have experience with such problems.

If the arguments against privilege are unconvincing in the end, it should be noted that there still remains much work for defenders of executive privilege. To the extent that the power derives from arguments about inherent or indispensable presidential prerogatives, champions of executive privilege ought to explain if there are other similar, incidental powers that are also ceded to the executive. After all, we might be surprised to learn that such arguments only work to justify executive privilege. Moreover, proponents of privilege must confront the reality that there are as many versions of executive privilege as there are proponents and that each version of executive privilege seems to approximate exactly what the particular defender deems appropriate and just and no more. To some extent, such a comforting fit seems only natural—we always are tempted to believe that the Constitution mirrors our reason and preferences. Yet given this temptation, one must wonder whether policy judgments, rather than constitutional structure, actually generate the exact privilege deemed appropriate by the adherent of executive privilege.

A series of second-order concerns also ought to be answered. Does a retired President benefit from executive privilege if the current occupant chooses to not assert the privilege on behalf of the predecessor? After all, being

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166. See ROZELL, *supra* note 1, at 21. As Professor Rozell observes, "[a]ny power can be used to do right or to do wrong." *Id.*

167. To be sure, we may believe that one branch is more likely to abuse authority than another. To the extent the Constitution already resolves the question of privilege, however, we are not free to revisit it.

President is a short-term affair and many of the arguments for a privilege would seem to extend to conversations years after they occurred. Likewise, may the President use executive privilege to muzzle those who might be all too willing to disclose confidential information? For instance, the President has a conversation with his secretary of state about what do with respect to ground troops in another country. The secretary of state proposes to testify before Congress on the subject of his presidential conversation. May the President declare this conversation "privileged" and off-limits to Congress? Once again, many of the arguments for privilege apply in these circumstances. To date, proponents of executive privilege have done an excellent job of insisting upon the reasonableness of the privilege, but have not adequately explained the limits of the privilege they would establish.



